Supreme Court, U.S.
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No. 95-261

In The

Supreme Court of the United States

October Term, 1995

WILLIAM L. JONES AND J.H. WRIGHT,

Petitioners,

vs.

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Fourth Circuit properly conclude that the conduct of Petitioner Wright, in involving himself in an FELA action brought by an employee whom he did not represent and in which he was not a witness, was not protected under Section 60 of the Federal Employer's Liability Act, 45 U.S.C. § 60 (FELA) (1982)?

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STATEMENT OF THE CASE

A. Background

Respondent Norfolk Southern Railway Company is a common carrier which engages in interstate commerce. (JA 47). One hundred percent of the common stock of Norfolk Southern Railway Company is owned by Respondent Norfolk Southern Corporation. (JA 47). At all times in question Norfolk Southern Railway Company maintained Hayne Shop located in Spartanburg County, South Carolina.[1] (JA 46). Among other things, railroad cars were repaired and rebuilt at Hayne Shop. (JA 80).

Personnel employed by Norfolk Southern Railway Company at Hayne Shop fall into two categories: those individuals who are employed on an hourly basis and who are represented by a union; and those individuals who are salaried employees, who are not represented by a union, and who are generally referred to as company officials. Both Plaintiffs are members of the former category.

Those individuals who are employed at Hayne Shop and who are represented by a union are generally employed in one of six crafts. These crafts include carmen, blacksmiths, clerks, electricians, machinists, and pipe fitters. (JA 220, 239). Carmen employed at Hayne Shop are represented by the Transportation Communications International Union, Brotherhood of Railway Carmen's Division (BRC). (JA 46-47). Blacksmiths employed

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[1] Hayne Shop was closed on July 3, 1995. Both Petitioners continue to work for Respondent Norfolk Southern Railway Company but now work at other locations.

at Hayne Shop are represented by the International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers, and Helpers Union (IBB). (JA 46).

Petitioner William L. Jones was employed by Defendant Norfolk Southern Railway Company as a blacksmith/welder at Hayne Shop. (JA 46). Petitioner Jones worked in a building known as the "Reclamation Shop" at Hayne Shop. (JA 106). As a blacksmith, Jones is represented by the IBB. (JA 46).

Petitioner J.H. Wright was employed by Respondent Norfolk Southern Railway Company as a carman at Hayne Shop. (JA 46). Petitioner Wright worked in a separate building known as the "Freight Shed" at Hayne Shop. (JA 105). He was the local chairman of the BRC. (JA 46-47, 80). As such, Petitioner Wright represented carmen and painters; he did not represent blacksmiths.

The terms and conditions of employment of those individuals at Hayne Shop who are employed on an hourly basis and who are represented by a union are set forth in collective bargaining agreements entered into between the various labor organizations and Norfolk Southern Railway Company. (JA 81, 302-319). Certain of the labor organizations representing employees at Hayne Shop have local officers called local chairmen. For example, the blacksmiths local chairman, Tom Austin, is an employee at Hayne Shop. (JA 67, 77).

The local chairman often deals with company officials at Hayne Shop with respect to issues that arise under applicable collective bargaining agreements affecting their craft. The duties of a local chairman include

handling grievances and representing members of their craft in disciplinary proceedings. (JA 80, 109, 302-319).

Employees working under a collective bargaining agreement at Hayne Shop are subject to various degrees of discipline (for example, letters of reprimand, suspension, termination, etc.) under the terms of applicable collective bargaining agreements. Matters which can give rise to discipline include absenteeism, violation of company rules, improper performance, insubordination, conduct unbecoming an employee, and disloyalty. (JA 108, 110, 111).

Under the terms of applicable collective bargaining agreements, employees at Hayne Shop are accorded various rights and protections in instances where discipline may be imposed. (JA 111-116, 223, 240, 264, 302-319). Under the terms of both the BRC and the IBB collective bargaining agreements an employee is ordinarily entitled to notice of any charge that is made against him. (*Id.*)

Under the terms of both the BRC and the IBB collective bargaining agreements, an employee must be afforded an opportunity for a preliminary investigation. (JA 111-116, 309-319). Following the preliminary investigation the company can assess discipline or defer its decision concerning imposing discipline until a formal investigation is held. (*Id.*) When a formal investigation is held, the employee against whom a charge is made is entitled to various rights and protections including the right to be represented by a union representative and the right to procure witnesses. (*Id.*)

If discipline is assessed against an employee at the conclusion of either a preliminary investigation or a formal investigation, the aggrieved employee has the right to pursue various levels of appeal through an appeal and grievance procedure provided under the terms of the Collective Bargaining Agreement and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982). The highest level of appeal afforded an aggrieved employee under the terms of a Collective Bargaining Agreement and the Railway Labor Act is an appeal to the National Railroad Adjustment Board or a Board of Adjustment (which includes a Public Law Board) which conducts an arbitral review of the employee's claim. *Id.* Through this appeal and grievance process an aggrieved employee can obtain appropriate relief including payment for lost time, reinstatement, and the like. *Id.*

Respondent Norfolk Southern Railway Company has adopted a number of rules that govern the conduct of its employees. (JA 111). Among these is General Conduct Rule 2(a). (JA 121, 242, 301). General Conduct Rule 2(a) provides as follows:

> An employee must not give any written, oral or other information about an accident to anyone but Company officers, government investigators or law enforcement officers, unless directed by court order. Others seeking information must be referred to the General Manager Casualty Claims. This rule does not prohibit an employee from giving information about injury or death of a Company employee to that employee or his legal representative.

(JA 121, 301).

B. Petitioner Jones' FELA Action

On or about May 30, 1990, Petitioner Jones allegedly suffered an injury while working as a blacksmith for Respondent Norfolk Southern Railway Company. (JA 47). Petitioner Jones retained the law firm of C. Marshall Friedman, P.C., to represent him and to pursue a claim against Respondent Norfolk Southern Railway Company for his alleged injuries pursuant to the Federal Employer's Liability Act (FELA). (JA 47).

In approximately mid-April 1991, Petitioner Jones approached Petitioner Wright in the parking lot before work. Petitioner Jones (a blacksmith) asked Wright (a carman) if Wright would speak with blacksmiths Southern, Lambert, and Bayne. Petitioner Jones asked Wright to ask the three blacksmiths to meet with a representative from Jones' attorneys' office. (JA 86-88, 138-139, 141-143).

Jones had worked with blacksmiths Southern, Lambert, and Bayne in the Reclamation Shop for approximately seventeen years. (JA 143, 144). Nonetheless, Jones asked Wright to make arrangements for the three blacksmiths to meet with his lawyers' representative rather than do so himself.

Later that same day, Petitioner Wright left the Freight Shed where he worked and went to the Reclamation Shop. (JA 88-90). At the Reclamation Shop, Wright asked blacksmiths Southern, Lambert, and Bayne to go to a local motel in Spartanburg, South Carolina on or about April 19, 1991, to meet with a representative from the Friedman law firm. (JA 161, 278, 293).

On or about December 19, 1991, the Friedman law firm filed a lawsuit on Jones' behalf against defendant Norfolk Southern Railway Company in Memphis, Tennessee. In the lawsuit Jones sought to recover damages under the FELA for the injury that he allegedly suffered. During the course of that litigation, counsel for Norfolk Southern Railway Company served interrogatories on Petitioner Jones. (JA 48). Petitioner Jones' counsel served initial responses on or about June 17, 1993. (JA 48). In his initial responses Jones failed to identify persons with knowledge concerning alleged negligence on the part of defendant Norfolk Southern. (JA 35-38).

Petitioner Jones' attorneys thereafter filed supplemental responses to defendants' interrogatories on November 30, 1993. (JA 40-41, 48). Among the witnesses identified by plaintiff Jones on November 30, 1993, were F. J. Lambert, S. L. Southern, and B. S. Bayne, all of whom are blacksmiths who worked with Petitioner Jones in the Reclamation Shop. (*Id.*) Significantly, Petitioner J. H. Wright was never identified by Petitioner Jones as a witness in Jones' FELA action. (JA 144).

Respondent Will Harden is employed as a Claim Agent in the Casualty Claims Department of Norfolk Southern Corporation.[2] (JA 47). As a Claim Agent, Respondent Harden is responsible for conducting interviews of potential witnesses in an action brought by an

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[2] At trial, the United States District Court granted Defendant Harden's motion for a directed verdict. On appeal to the Court of Appeals for the Fourth Circuit, Petitioners did not contest the District Court's dismissal of Harden. Therefore, the dismissal of Harden is not before this Court.

injured employee under the terms of the FELA. (JA 201-202).

Shortly after Jones identified Southern, Lambert, and Bayne as witnesses in his FELA action, Respondent Harden was asked to interview and take recorded statements from these three individuals. (JA 204). At 2:00 p.m. on December 17, 1993, Harden took a recorded statement from B. S. Bayne. (JA 204, 205, 272-277). Bayne answered a number of questions about conditions in the Reclamation Shop at Hayne Shop. No mention was made of Petitioner J. H. Wright during the course of Bayne's interview. (*Id.*)

At 2:30 p.m. on December 17, 1993, Respondent Harden took a recorded statement from S. L. Southern. (JA 206, 278-285). Southern answered a number of questions concerning conditions in the Reclamation Shop. (*Id.*) During the course of that interview Southern, a blacksmith, advised Harden that Jack Wright, local chairman for the carmen, had previously asked him to go to a local motel to meet with Jones' lawyer. (*Id.*)

At 2:15 p.m. on December 23, 1993, Respondent Harden took a recorded statement from F. J. Lambert. (JA 208-209, 286-295). During the interview Lambert answered a number of questions about conditions in the Reclamation Shop. During the course of the interview Lambert, a blacksmith, also indicated that Wright, local chairman for the carmen, had asked him to go to a local motel to give a deposition or a statement to Jones' attorneys. (*Id.*)

On or about January 16, 1994, Respondent Norfolk Southern Railway Company decided to conduct a preliminary investigation on charges of disloyalty and conduct unbecoming an employee against Petitioner Wright because of his assistance with plaintiff Jones' FELA lawsuit against the company. A preliminary investigation is provided for under Rule 34 of the BRC Collective Bargaining Agreement. On January 17, 1994, Respondent F. W. Stevenson, assistant shop manager at Hayne Shop, convened a preliminary investigation. (JA 244-245). The preliminary investigation was postponed at Petitioner Wright's request. (JA 244-245).

Following the postponement a decision was made to reconvene the preliminary investigation. (*Id.*) On January 19, 1994, Respondent Stevenson reconvened the preliminary investigation. The investigation was held on charges against Wright for acting in a disloyal manner and for conduct unbecoming an employee. (JA 243). Respondent Stevenson, Respondent Harden, Petitioner Wright, Mr. Southern, Mr. Bayne, Mr. Lambert, and Senior General Foreman E. A. Hill were present. (JA 210-211, 247-248). Also present were Ben Johnson, Assistant Local Chairman for the Carmen, and Tom Austin, Local Chairman for the Blacksmiths. (JA 210-211, 247-248).

During the preliminary investigation, Respondent Harden went over the circumstances of his interviews with Southern, Lambert, and Bayne. Harden stated that Southern and Lambert told him in the course of his interviews that Wright, local chairman for the carmen, had asked them to meet with the attorney representing Jones, a blacksmith, in his FELA action. (JA 210-211, 247). Also during the preliminary investigation, Southern,

Lambert, and Bayne stated that Wright came to the Reclamation Shop where the blacksmiths worked and asked the three of them to go to a local motel to meet with an attorney or representative from the law firm representing Jones. (App. 211-212).

During the preliminary investigation Wright denied asking the three blacksmiths to meet with an attorney or representative from the law firm representing Jones. (JA 212, 248). At trial, however, Petitioner Wright conceded that he did make arrangements for the three blacksmiths to meet with Jones' attorneys' representative. (JA 87).

At the conclusion of the preliminary investigation Respondent Stevenson announced that he would take the matter under advisement. He did not render a decision or assess any discipline against Petitioner Wright. (JA 249). Pursuant to provisions of Rule 34(e) of the BRC Collective Bargaining Agreement, Respondent Norfolk Southern Railway Company decided to withhold a decision and any discipline on the charges against Wright pending a formal investigation. (JA 249, 314, 315).

On January 19, 1994, Respondent Stevenson wrote a letter to Petitioner Wright to advise Petitioner Wright that a formal investigation would be held to determine whether Petitioner Wright's acts constituted "conduct unbecoming an employee and acting in a disloyal manner by asking blacksmiths S. L. Southern, F. J. Lambert, and B. S. Bayne to meet with a representative of a law firm at the Radisson Hotel, now known as the Quality Hotel, Spartanburg, South Carolina on some date during 1991 and 1992, which law firm was then representing blacksmith W. L. Jones in a lawsuit against the carrier." (JA 50).

On January 20, 1994, Petitioner Wright wrote Respondent Stevenson and asked that the formal investigation be postponed. (JA 44, 51). On January 21, 1994, Respondent Stevenson wrote Petitioner Wright and agreed to postpone the formal investigation. (JA 45, 51). This lawsuit followed.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fourth Circuit is consistent with prior decisions of the other Courts of Appeal which have addressed this issue including the Eleventh and Fifth Circuits in *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146 (5th Cir. 1980), *Woodrum v. Southern Ry. Co.*, 750 F.2d 876 (11th Cir. 1985) and *Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637 (5th Cir. 1985). The decision of the Court of Appeals for the Fourth Circuit is also consistent with the intent underlying Section 60 of the FELA. Petitioner Wright was not a witness concerning the facts and circumstances of Petitioner Jones' FELA action nor did Wright furnish information to a person in interest. Therefore, Petitioner's Petition for a Writ of Certiorari should not be granted as there is no conflict among the Courts of Appeal on this issue and there are no other special or important reasons which call for an exercise of this Court's power of supervision.

ARGUMENT

I. Petitioner's Petition for a Writ of Certiorari should not be granted.

Petitioner's Petition for a Writ of Certiorari should not be granted as there are no special or important reasons which call for an exercise of this Court's power of supervision. The opinion of the Court of Appeals for the Fourth Circuit is consistent with the prior decisions of other Courts of Appeal. The decision is also consistent with the express statutory language and underlying intent of Section 60.

A. The opinion of the Court of Appeals is consistent with the decisions of other appellate courts.

Petitioners assert that the opinion of the Court of Appeals for the Fourth Circuit conflicts with decisions on the same issue rendered by other Courts of Appeal. Petitioners are incorrect. The decision of the Court of Appeals is consistent with the prior decisions of other appellate courts.

In *Woodrum v. Southern Ry. Co.*, 750 F.2d 876 (11th Cir. 1985), the Court of Appeals for the Eleventh Circuit likewise held that Section 60 protects railroad employees only when they furnish "facts incident to the injury or death of any employee" to an interested party.

In that case, Woodrum had been required to attend an investigation on charges against him for "conduct disloyal and unbecoming an employee." Woodrum was charged with arranging for a fellow employee, Eddie Lee

Robinson, to meet with an attorney specializing in FELA actions. Woodrum was not a witness concerning Robinson's alleged injury.

The Defendant in *Woodrum* learned of Woodrum's participation through the regular activities of its claim agent. Robinson advised the claim agent that Woodrum had arranged for him to meet with Burge, the FELA attorney. Importantly, Woodrum was not a member of the same labor organization as Robinson.

The Court of Appeals for the Eleventh Circuit held that the conduct of Woodrum was not protected conduct under Section 60 of the FELA. The court reasoned that the charges instituted against Woodrum did not stem from his activities as a potential witness in Robinson's FELA action. Rather, the charges against Woodrum related solely to his participation in arranging a meeting between Robinson and attorney Burge. While the court recognized that labor unions maintain lists of approved attorneys, the court made specific mention of the fact that Woodrum and Robinson were not members of the same union nor was Burge an attorney appearing on the list.

Similarly, the Court of Appeals for the Eleventh Circuit in *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146 (5th Cir. 1980), affirmed a grant of injunctive relief against a railroad to preclude the carrier from initiating an investigation. In that case, the court held that the conduct was protected because the employee was a witness in an FELA action who attempted to furnish information to a person in interest.

In *Hendley* the Defendant initiated a formal investigation against Hendley for "meeting Razook [an FELA

plaintiff] and his attorney on the [railroad] property, discussing the physical layout of the tracks, and giving a deposition to be used in the case." *Id.* at 1153. The Court of Appeals held that the actions of Hendley constituted conduct which falls within the protection of Section 60. *Id.*

The *Hendley* court addressed "whether a federal court also has jurisdiction, when an FELA case has been concluded, to enjoin a disciplinary hearing used by a railroad for retaliatory purposes in violation of § 60." *Id.* at 1150. The court concluded that the federal court could issue the injunction because Hendley was a witness in Razook's FELA action. Hendley had given deposition testimony in the case and the actions which the court deemed protectable related to Hendley's testimony and his assistance in furnishing information concerning the facts and circumstances surrounding Razook's accident. Specifically, Hendley assisted Razook and his counsel in analyzing the layout of the tracks on which Razook was working when he was injured.

In a later case, *Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit again recognized that the purpose of Section 60 "is to prohibit the 'overwhelming coercive effect' that disciplinary actions by railroads have on an employee's willingness to testify in a FELA case." *Id.* at 641. Like the Fourth Circuit here, the court held that, in order to be protected, a railroad employee must be disciplined for furnishing information in an FELA case. *Id.* at 641 (quoting *Hendley*, 609 F.2d at 1153).

As all of these cases indicate, the decision of the Court of Appeals for the Fourth Circuit is consistent with the decisions of other Courts of Appeal which have been called upon to interpret the scope of protection of Section 60. The courts have uniformly recognized that the protection of Section 60 is limited to persons who are witnesses concerning the facts and circumstances of a co-employee's FELA action. Further, the courts have consistently held that such conduct is protected only if information furnished by a witness is supplied to a person in interest.

In its opinion here, the Court of Appeals for the Fourth Circuit underscored the fact that its decision is consistent with decisions on the same matter from other circuits. In distinguishing *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061 (D. Colo. 1982), a district court opinion relied upon by Petitioners, the Court of Appeals wrote:

> We rely rather on the unambiguous statutory language of § 60 as consistently applied both by this Court and our sister circuits.

Opinion at A-5 n.2.

In the present matter, the District Court and the Court of Appeals properly concluded that Petitioner Wright was not a witness in Petitioner Jones' FELA action. Further, the District Court and the Court of Appeals properly determined that Petitioner Wright did not furnish information to a "person in interest." Both Courts properly applied the principles underlying the FELA in a manner consistent with decisions from other

Courts of Appeal and held that Petitioner Wright's conduct does not constitute protected conduct under Section 60.

B. The opinion of the Court of Appeals is consistent with the language of Section 60 and the underlying policy considerations behind the statute.

Section 60 of the FELA provides in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense; Provided, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

45 U.S.C. § 60.

The Act specifically indicates that its provisions protect "any person" who voluntarily furnishes "information to a person in interest". 45 U.S.C. § 60. Additionally, the legislative history of § 60 plainly establishes the well-defined, but limited purpose of that section: "The purpose of the amendment [which became FELA § 10] under consideration is to . . . *permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee* or his dependents, or to someone authorized to represent him or them." S. Rep. No. 661, 76 Cong., 1st Sess. 5 (1939) (emphasis added).

Here, the Court of Appeals properly found Section 60 to be clear and unambiguous on its face. The Court of Appeals then addressed the narrow scope of Section 60. The Court wrote:

> Discerning no ambiguity in the language of § 60, we look to its plain meaning. Section 60 prohibits employers from disciplining employees for engaging in protected activity. Conversely, the language defining protected employee conduct narrowly limits the application of § 60 to the actions of an employee who "furnish[es] voluntarily information to a person in interest as to the facts incident to the injury or death of any employee." 45 U.S.C. § 60.

Opinion pp. A6-A7. The Court of Appeals correctly concluded that Section 60 was intended to prevent a railroad from denying an injured employee access to other employees who could potentially provide useful testimony in his or her FELA lawsuit.

The Court of Appeals then turned to the facts of this case. The Court concluded that Section 60 "affords no

protection for Wright's actions. . . . " Opinion at A-9. The Court based its decision on two key facts. First, the Court determined that Petitioner Wright is not a person whom Section 60 was intended to protect. "Wright, having no personal knowledge of facts incident to Jones's injury, was not a potential witness in the underlying FELA action." Opinion at A-7.

Second, the Court of Appeals concluded that the recipient of any communication from Wright was not a "person in interest" under the statute. Wright simply conveyed a message to potential witnesses in Jones's FELA action. Wright did not convey any information of any kind to either Jones or his attorney. Given this, the Court observed: "Thus, the nature of the information Wright imparted and the identity of the recipients of his message preclude us from according § 60 protection to his conduct." Opinion at A-8. Thus, the Court of Appeals properly concluded that the conduct of Petitioner Wright did not constitute protected conduct under the express language of or intent underlying Section 60 because Petitioner Wright was not a witness in Jones' FELA action nor did Petitioner Wright furnish information to a "person in interest." Opinion at A-8.

CONCLUSION

Based upon the foregoing authorities and argument, Respondents respectfully submit that the Petition for a Writ of Certiorari must be denied. The opinion of the Court of Appeals for the Fourth Circuit is consistent with not only the express language of and intent underlying Section 60 of the FELA, but also the decisions of the other Courts of Appeal. There are no other special or important reasons which call for an exercise of this Court's power of supervision.

Respectfully submitted,

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